No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

v.

THE INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 330

UNITED STATES OF AMERICA, APPELLANT

v.

THE INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I

THE JURISDICTIONAL ISSUES

A. *The right to sue the Interstate Commerce Commission.*—Contending that the United States could not properly name the Interstate Commerce Commission as a party defendant in this action, and that this suit was and is, properly, brought by the United States only against the United States, the railroad appellees place great reliance on statements in the majority committee report on the bill which became the Mann-Elkins Act, to the effect that the pre-existing right to sue the Commission was to be terminated by that Act (Br. 27–28, note 12, 49). But, in a case

raising a related problem, this Court has repudiated the majority Senate and House Reports as guides to the Congressional purpose in the bill as finally enacted, and has relied upon the minority reports and statements of minority Senators as indicative of the Congressional intention. *Interstate Commerce Commission* v. *Oregon-Washington Railroad and Navigation Co.*, 288 U. S. 14, 26.[1]

It is clear that the minority was intent upon maintaining the Commission as sole defendant. And while its view did not wholly prevail, the compromise adopted certainly permitted the joinder of the Commission as a party defendant. In this connection, the statements of Senator Elkins are particularly pertinent. Discussing the bill as amended by the opponents of the administration bill in the House, and which remained in that form as finally enacted, Senator Elkins said (45 Cong. Rec. 6390–6391):

> * * * As I understand the House Amendment provides that a party of record, a complainant of record before the Interstate Commerce Commission has a right to appear, the Interstate Commerce Commission continues a defendant all the way to the Supreme Court of the United States, and the United States is made de-

[1] See fn. 7, 288 U. S. 26, citing House Report No. 923, 61st Cong., 2nd Sess., p. 158, 45 Cong. Rec. 5524; Senate Report 355, Part 2, pp. 5, 6, 7, 61st Cong., 2nd Sess., 45 Cong. Rec. 4604, 4607, 4606, 6445, 6451, 6462.

fendant; that is, *the House amendment makes three defendants, as it were.* [Italics supplied.]

Senator Burkett voiced the middle-of-the-road approach which was most truly representative of the bill as finally enacted when he said (45 Cong. Rec. 6399):

> * * * I am ~~not~~ very particular whether these suits are, in name against the United States or against the commission, but I am very earnest in the proposition that the commission shall be the real party that is defending this action clear through to the end. I am not very particular whether the suit shall be called against the United States or against the commission. I think that is a difference without very much significance, but I am very insistent that the commission shall be in these cases and shall defend them clear through.

Appellee railroads concede that before adoption of the Mann-Elkins Act, suits to set aside orders of the Commission properly named the Commission as a defendant, and Section 22 of the Interstate Commerce Act (49 U. S. C. 22) provides that "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." The right to name the Interstate Commerce Commission as a defendant in such suits was not specifically forbidden or excluded in the Mann-Elkins

Act. On the contrary, the Act refers to "the Interstate Commerce Commission * * * and to such other persons as may be defendants in the suit" (28 U. S. C. 47), and under that Act the "Commission continues a defendant all the way to the Supreme Court." See Senator Elkins, *supra*.

Consequently, we think it clear that were the matter otherwise more doubtful than it is, Section 22 would remove all doubts as to the continued right to join the Commission as a party defendant in suits such as this.

B. *The right of the United States to sue.*—The railroad appellees attempt to distinguish *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567,[2]

[2] The assumption of jurisdiction in these cases instituted by a wholly-owned government corporation is not to be denied significance on the ground, reiterated by the railroad appellees (Br. 40, 52), that the jurisdictional issue was not there raised or decided. In *Commissioner of Internal Revenue* v. *Estate of Bedford*, 325 U. S. 283, 285, this Court said:

"Even long continued practice cannot alter the limits within which Congress has bound the appellate jurisdiction of this Court. * * * *But such practice may be decisive in interpreting procedural ways which, as a matter of dialectic or abstract analysis, may appear dubious.*" (Italics supplied.)

Moreover, in the *Mechling* case, the brief for the Interstate Commerce Commission (No. 72, October Term, 1946, pp. 80–81) specifically and directly discussed, in connection with the obligation of the Commission to serve the United States with a notice of appeal, the right of the United States to bring suit to set aside an order of the Commission. It can-

on the ground that the Congressional authorization to the Inland Waterways Corporation to sue and be sued in its own name evidences a Congressional purpose to permit the Inland Waterways Corporation to sue the United States under the Urgent Deficiencies Act (Br. 41). But it was early established that the United States may sue in its own name (*Cotton* v. *United States*, 11 How. 228, 231; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *Chamberlin*, 219 U. S. 250), and the statute referred to merely put the child of the Government on equal terms with the parent insofar as the right to resort to the courts was concerned.

In this case, as in the *Inland Waterways* and *Mechling* cases, there is and was no doubt that the plaintiff was a proper party to the proceedings before the Commission. Section 13 (1) of the Interstate Commerce Act, 49 U. S. C. 13 (1). Under 28 U. S. C. 45a (see Appendix to our main brief, p. 106), it follows that the United States here, like the Inland Waterways Corporation in those cases, was entitled to bring suit to set aside the order of the Commission. This is made clear by Mr. Justice Brandeis' opinion for the Court in *The Chicago Junction Case*, 264 U. S. 258, 267–268:

---

not be said, consequently, that the right of the United States and its instrumentalities to sue went entirely unnoticed in the *Mechling* case.

> The plaintiffs may challenge the order because they are parties to it. The Judicial Code, § 212 (originally the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 542), declares that any party to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order." The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. * * * No case has been found in which either this Court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission but did not do so, have been allowed to maintain such suits where the requisite interest was shown.

Those more recent instances in which a party before the Commission has been denied the right to institute suit to set aside the Commission's order are all cases, unlike this, in which the plaintiff could not allege a direct and immediate injury sufficient to give him standing. *Sprunt & Son* v. *United States*, 281 U. S. 249, 254–255; *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486; *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632; *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119–120.

Decisions like that in the *Moffat Tunnel League* case, *supra*, denying to an unincorporated voluntary association interested in the development of adequate transportation facilities the right to sue, made it necessary for Congress, in the Agricultural Adjustment Act, specifically to authorize the Secretary of Agriculture to bring suit to set aside an order of the Commission. Section 201 of the Agricultural Adjustment Act of 1938, 52 Stat. 36, 7 U. S. C. 1291. When, as here, the interest asserted is "more than a sentiment" (289 U. S. at 119), no such specific statutory authorization is required. The Congressional grant to the Secretary of Agriculture of authority to bring suit thus implies no denial of the right of the Government, as a shipper and not merely representing the "public interest" (7 U. S. C. 1291 (b)), to institute such proceedings (cf. Railroad appellee's brief, pp. 33–34); it constitutes, on the contrary, Congressional recognition that there are instances in which courts may appropriately decide cases in which two branches of the Government have opposing interests. Compare also *United States* v. *Public Utilities Commission of the District of Columbia*, 151 F. 2d 609 (C. A. D. C.), certiorari denied, 331 U. S. 816.

C. *Section 9 afforded no option to the United States in this case.*—In its principal brief (pp. 47–56), the Government has sought to show that when, as here, a shipper claims to have suffered

damages and the claim is one which raises questions which only the Commission can decide, it cannot exercise the option granted by Section 9 to sue on such claim in the courts, and is, hence, not to be denied judicial review on the ground that it has elected to abide by the administrative determination. The limitations provisions found in Section 16 (3) (b) and (c) of the Interstate Commerce Act, as substantially amended by the Act of June 7, 1924, 43 Stat. 633, put this beyond doubt. 49 U. S. C. 16 (3) (b) and (c).

Section 16 (3) (b), which is concerned with the "recovery of damages not based on overcharges" provides *only* for proceedings before the Com-

---

Section 16 (3) provides as follows:

(b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

* * * * *

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

mission. Section 16 (3) (g) defines "overcharges" "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission" and it is evident that, in this case, the claim of the United States was "not based on overcharges". *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, 202. See also our principal brief, pp. 61–102. Thus the United States could only go to the Commission in this case. By contrast, Section 16 (3) (c) contemplates either an "action at law" or a "complaint filed with the Commission" when the proceeding is for "recovery of overcharges."

The House Committee reporting the bill which became the Act of June 7, 1924, substantially rewriting Section 16 of the Interstate Commerce Act, thus summed up the remedies available to shippers (H. Rep. No. 796, 68th Cong., 1st Sess., p. 1):

> The shipper can proceed by two methods: He can complain to the Interstate Commerce Commission or he can bring suit for damages. *In claims for reparation he makes complaint to the Commission;* and *generally, in claims for straight overcharges, he brings a court action* in the first instance to recover the amount due him for a charge which is in excess of the published tariff.

It is only in an overcharge situation that an election is afforded by Section 9.

The appellees insist, however that initial resort can be made to the Commission for the indispensable administrative determination which, if favorable to the petitioner, would then become the basis of a suit in a Federal district court. Were the petitioner to follow this procedure, it is clear, of course, that he would be required to exercise care not to accompany his prayer for the administrative determination with a prayer for damages, for such a step would constitute the election under Section 9 which, the appellees contend, forecloses review of the Commission's order in this case under the Urgent Deficiencies Act.

Support for the appellees' suggestion is sought to be drawn from this Court's language in the *Abilene* case, 204 U. S. 426, 442. This Court, in denying, under circumstances comparable to those here involved, the right "originally" and "primarily," to go to the courts, clearly was using those words to distinguish a suit initially instituted in a court for reparations under Section 9 from the procedure for enforcement of an order of the Commission awarding reparations under Section 16 (2) of the Interstate Commerce Act. 49 U. S. C. 16 (2). This Court's language in no way supports the appellees' strained reading of Section 9. In *Robinson v. Baltimore and Ohio Railroad Company*, 222 U. S. 506, this Court said (p. 511): "It is apparent that neither provision

[Sections 22 and 9] recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and *order* of the Commission." [Italics supplied.] The order referred to by the Court in that case was a reparation order and could not be obtained except where the complainant before the Commission had sought damages. That step, of course, would constitute the election under Section 9 which the railroad appellees contend here forecloses judicial review of the Commission's order in this case.

The construction of Section 9 contended for by the Government in this case, that no independent right exists to resort to the courts initially in suits for damages involving administrative questions, finds substantial support in the dissent of Mr. Justice Pitney in *Mitchell Coal and Coke Company* v. *Pennsylvania Railroad Company*, 230 U. S. 247, 267. The majority of the Court in the Mitchell case did not dispute (230 U. S. 250, 256–7) Mr. Justice Pitney's analysis of the effect of the majority decision in cases involving administrative questions within the Commission's primary jurisdiction:

> Since the result reached by the court in these cases has the effect of virtually eliminating the option conferred by § 9 of the Interstate Commerce Act upon shippers aggrieved by unjust discriminations prac-

[1] See Brief for the railroad appellees, p. 60.

ticed by common carriers in violation of § 2 and 3—the option to "either make complaint to the Commission" or to "bring suit for the recovery of the damage" * * *; and since in this and in other respects aggrieved shippers are to be deprived, in very large measure, of the right of redress by private action at law conferred by § 8 and 9 for violations of § 2 and 3, I deem it my duty to express, somewhat at length, the grounds of my dissent.

Adoption of the procedure proposed by the appellees would be tantamount, as a practical matter, to denying resort to the courts. It is commonly known that proceedings before the Commission are lengthy and time-consuming and, hence, expensive. In this case, the proceeding before the Commission was instituted on April 15, 1944, and completed on July 25, 1947. The appellees apparently concede that after such a proceeding before the Commission, a shipper would be entitled under the Urgent Deficiencies Act, as interpreted by this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12 (Railroad appellees' Br. 64; Commission Br. —), to judicial review of the Commission's orders denying relief. The suitor before the Commission, if successful in the review proceedings brought under the Urgent Deficiencies Act, would then return to the Commission for further proceedings before that body not inconsistent with the court's action. If successful before the Com-

mission, the matter would then be ripe for the institution of a suit in a Federal district court, which proceeding would carry with it all of the days and incidents of such litigation.

But prior to the institution of such a suit in a Federal district court, the two-year statute of limitations would normally have foreclosed resort to the courts. Section 16 (3) (c) of the Interstate Commerce Act, 49 U. S. C. 16 (3) (c). The railroad appellees, apparently anticipating that this circumstance would be brought to the attention of the Court, concede (Br. 61-62) that there is a hardship rule which would be applicable in cases where the period provided by the statute of limitations would expire while the proceeding before the Commission and proceedings to review the administrative determination were being conducted. To provide for this contengency, the appellees suggest that there is a right under such circumstances to institute an action in a federal district court for damages, and to insist that the Federal district court stay its hand while the proceedings before the Commission and courts convened under the Urgent Deficiencies Act are being completed. But that so-called "hardship" would be present in virtually every case, and the appellees' thus complete their circle of reasoning by insisting on primary resort to the courts in virtually all Section 9 cases. As shown in our main brief, however, this Court has made it clear that the

"hardship" cases are the exception and not the rule. (pp. 54-55).

To suggest, moreover, that the damaged suitor may make his election under Section 9 after the proceeding before the Commission limited to seeking an administrative determination, is concluded, is to argue in the face of the Commission's General Rules of Practice (49 F. R. 6399) which provide (Rule 1.32(b)): "Except under unusual circumstances, and for good cause shown, damages will not be awarded upon a complaint unless specifically prayed for, *or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.*" [Italics supplied.] The Commission, interpreting Rule 1.32(b), has said: "The obvious purpose of the rule is to prevent piecemeal litigation" (*Nelson Fuel Company* v. *Chesapeake & Ohio Railway Company*, 120 I. C. C. 723, 728), and to insure that "the Commission and the defendants" shall be "fully and fairly put on notice as to the extent of the claims presented in, and necessarily connected with, the complaint. * * * It is obvious fairness that complainants be required to disclose their whole case * * * that unnecessary multiplicity of proceedings cannot be encouraged or even tolerated." *Virginia-Carolina Chemical Corp.* v. *Akron, Canton & Youngstown Railway Company*, 248 I.C.C. 519, 521. See, also, *Ohio Valley Refining Co.* v. *Seaboard Air Line Ry. Co.*, 174 I.C.C.

635; *Jackson Traffic Bureau* v. *Alabama & V. Ry. Co.*, 118 I.C.C. 217; *Mississippi Farm Bureau Truck Assn.* v. *A. & V. Ry. Co.*, 136 I.C.C. 619; *Oklahoma Portland Cement Co.* v. *Arkansas W. Ry. Co.*, 159 I.C.C. 207. Thus, it seems clear that the Commission would not permit any election under Section 9 after the proceeding seeking an administrative determination had been concluded.

II.

THE MERITS

A. *The scope of review.*—The railroad appellees contend (Br. pp. 66, 67, 89) that the attack made by the Government on the findings set forth by the Commission to sustain its ultimate conclusions constitutes an attempt on the part of the Government to persuade this Court to substitute its judgment for that of the Commission. We assert only that the findings put forth by the Commission in support of its conclusions are not adequate for that purpose. In our view, the appellee railroads are attempting to sustain the Commission's ultimate conclusions even though its subsidiary findings are not rationally related to those conclusions.

"The Commission is the fact finding body," not the court. *Florida* v. *United States*, 282 U. S. 194, 215. The Commission must not only make a "suitably complete statement" (282 U. S. 215) of the reasons for its ultimate conclusions but

also it must make "the basic or essential findings required to support the Commission's orders." *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489. The purpose of this requirement is "to enable the parties and [the court] to understand, with a fair degree of assurance, why the Commission acts as it does." *Eastern Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 209–210.

But compliance with this requirement is not the end of the matter, as the findings must supply the required "rational basis". *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287. Nor can rejection of the findings as inadequate be construed to mean that "the result the Commission has reached would not be sustained if a sufficient basis were supplied in the record." *Eastern Central Motor Carriers Association* v. *United States*, *supra*, p. 210. The proceedings before the Commission involved "mixed questions of law and fact." *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 547. Irrelevant findings, like irrelevant evidence, are not enough to support the Commission's order. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 578. The Commission's findings must

shew the propriety "from the standpoint of justice and law, of the step asked to be taken." *New England Division's Case*, 261 U. S. 184, 200. The Government's contention here is that the findings on which the Commission relies do not meet that test.

There lurk in the brief filed by the railroad appellees suggestions that findings made by the Commission under Sections 1 and 2 of the Act (49 U. S. C. 1, 2) are beyond the scope of judicial review. But this Court has reviewed findings made under Section 1 (*New York* v. *United States*, 331 U. S. 284, 343) and Section 2 (*Baltimore & Co.* v. *United States*, 319 U. S. 1, 6–7; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 576-583). The fact is that all such findings, "so far as considered by this Court, have uniformly been held to be subject to judicial review." *Chicago Junction Case*, 264 U. S. 258, 265.

B. *The railroads made no concessions to the Government.*—There also lurk in the railroad appellees' brief suggestions that the Government, instead of complaining of the treatment accorded to it by the railroads, should be grateful to them for granting a concession on the Government's traffic (Br. 73–74, 85, 92–93). This Court should not be deceived by these suggestions. The Government paid to the railroads the same export rates on its traffic that moved over the Army Base piers during the period of Government control as

those paid by private shippers, and paid the same export rates as those paid by private shippers prior to June 15, 1942, and subsequent to July 3, 1946, when the piers reverted to private control. The difference was that the Government was required to bear the expense of providing wharfage and handling services on its traffic, whereas shippers prior and subsequent to the period of Government control of the piers were provided with wharfage and handling services at no expense to them.

The Commission has consistently condemned application of domestic rates to export traffic of private shippers where, by reason of wartime emergency conditions, it was unjust and unreasonable to require compliance with the policing rules in the railroads' tariffs, the waiver of which policing rules is asserted here to result in a concession to the Government. *Peden Iron & Steel Company* v. *Texas & New Orleans Railroad Company*, 264 I. C. C. 769, 772–773; *Gulf Carloading Co. Inc.* v. *Baltimore & Ohio R. Co.*, 266 I. C. C. 283; *General Carloading Co. Inc.* v. *Baltimore & Ohio R. Co.*, 266 I. C. C. 243; *Storage-in-transit on Artificial Rubber*, 266 I. C. C. 693; *Chrysler Corp.* v. *New York Central R. Co.*, 234 I. C. C. 755; *C. B. Fox Co.* v. *Gulf, M. & O. R. Co.*, 246 I. C. C. 561; *River Petroleum Corp.* v. *Yazoo & M. R. Co.*, 258 I. C. C. 1; *Mid-Continent Petroleum Corp.* v. *Illinois Central R. Co.*, 258 I. C. C. 422;

Products-from-Sweden, Inc. v. *Lehigh Valley R. Co.*, 263 I. C. C. 760.

The Government's traffic that moved over the Army Base piers was export traffic in the usual and ordinary sense. It is well established that neither temporary stoppage of traffic, storage or processing, nor the fact that the traffic is not moving on through bills of lading, destroys the character of export traffic, and converts it to domestic traffic. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 527. Moreover, neither the fact that the railroads do not publish through rates with steamship companies to foreign ports, nor the fact that the Commission's authority under Part III of the Interstate Commerce Act does not extend to transportation of export traffic beyond the ports, nor the fact that the railroads do not contract to deliver beyond the ports, all asserted by the railroads (Br. 84–85), should confuse the issue as to the true character of the Government's export traffic that moved over the Army Base piers during the period of Government control. The railroads modified their export tariffs so as to make their export rates applicable in most instances to both Government and commercial traffic that moved over the piers during that period (R. 398, 401–402, 405, 455), not only to Government traffic consigned to the United States. Export rates are in the nature of proportional rates and they apply only to export traffic destined to foreign points

beyond the ports, and they never properly apply to domestic traffic. *Texas & Pacific Railway Co.* v. *United States*, 289 U. S. 627, 634, 639.

C. *The Government is entitled to recover whether or not the rates were reasonable.*—The railroad appellees contend (Br. 69, 89) that there being no provision in their tariffs for making an allowance for wharfage and handling services provided by shippers, "damages could be awarded only on a showing that the Army had paid excessive charges" and "disposition of the issue arising under Section 15 (13) became dependent on findings that the charges were unreasonable or discriminatory under Sections 1 or 2." The Government contends that it is entitled to damages for the railroads' refusal to make an allowance for the railroad facilities and services provided by it on its export traffic without regard to the question whether the rates and charges on the traffic exceeded reasonable maxima or were discriminatory.

The fact that the railroads had made no provision in their tariffs for an allowance for wharfage and handling services may not be used as a cover to protect them from the consequences of violating their statutory duty to make an allowance for those facilities and services. In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, *Union Pacific Railroad Company* v. *Updike Grain Company*, 222 U. S. 215, and *General American Tank Car Corp.* v. *El Dorado Ter-*

minal Co., 308 U. S. 422, the right of shippers to an allowance was determined in favor of the shipper without regard to the level of the rates paid on the traffic. Whether the rates and charges applied to the shippers' traffic exceeded reasonable levels or were discriminatory was not a factor in those cases. The condition to recovery of an allowance is that the shipper has provided a railroad facility or service included in the carrier's obligation, and "The shipper was then entitled, under the plain terms of § 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility" or the service. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. at 431.

Great Northern Ry. Co. v. *Sullivan*, 294 U. S. 458, 463, cited by the railroad appellees (Br. 89), is not in point here because only Section 1 was involved in that proceeding, and the case turned on the failure of the complainant to establish that the transportation charges paid by him for the complete movement there involved were excessive. Whether an allowance should be made to shippers for providing a railroad facility or service under Section 15 (13) is a legal matter, similar to storage-in-transit, not dependent on the level of the general rates. Cf. *Central Railroad Company of New Jersey* v. *United States*, 257 U. S. 247, 255, 257–258; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 582–583. The railroad appellees themselves state here (Br. 91)

that "The line-haul carriers, which make the rates, have no participation in the port services which are accorded or not, as the case may be, solely by the local lines at the port."

D. *The "plant-spotting" cases are not in point.*—The appellees rely heavily on the so-called "plant-spotting cases" in support of their contention that there was no obligation on the railroads to provide wharfage and unloading services in this case. The plant-spotting cases are not pertinent here because none of them involved the initial carrier's duty to forward through traffic safely to its connecting line. See our principal brief, p. 67. In fact, in one of those cases (*N. Y. C. & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 234), Judge Cardozo stated a rule which appears to be applicable here: "whatever is essential in order to complete delivery, the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due." The railroads refused both to provide wharfage and handling services and to make an allowance in lieu thereof in this case on the ground that the Army Base piers should be treated in the same manner as private piers (R. 80), not because the Army could prevent them from making delivery to ships nor because delivery was not included in the rates.

CONCLUSION

The judgement of the court below should be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
HERBERT A. BERGSON,
Assistant Attorney General.
STANLEY M. SILVERBERG,
DAVID O. MATHEWS,
PHILIP ELMAN,
JAMES E. KILDAY,
Special Assistants to the Attorney General.
FRANK F. VESPER,
JAMES C. MOORE,
Special Attorneys.

MARCH 1949.